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# **WHEN WILL THE LAW CATCH UP WITH TECHNOLOGY? JAYCEE B. v. SUPERIOR COURT OF ORANGE COUNTY: AN URGENT CRY FOR LEGISLATION ON GESTATIONAL SURROGACY**

## **INTRODUCTION**

Prior to the use of assisted reproductive methods,<sup>1</sup> only two options were available to an infertile couple:<sup>2</sup> they could remain

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<sup>1</sup> Assisted reproductive methods include surgical procedures such as in vitro fertilization (IVF) and gamete intrafallopian transfer (GIFT). See UNITED STATES CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 122–25 (1988) [hereinafter OTA REPORT] (discussing available surgical treatments for infertility); see generally JOHN A. ROBERTSON, CHILDREN OF CHOICE 97–145 (1994) (describing methods for treating infertility and collaborative reproduction); TECHNOLOGY AND INFERTILITY: CLINICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL ASPECTS 39–89 (Machelle M. Seibel et al. eds., 1993) (discussing various surgical procedures used to treat infertility). Artificial insemination and surrogate motherhood are reproductive methods that do not necessarily need medical procedures or technology, although they are commonly classified as “reproductive technologies.” See OTA REPORT, *supra*, at 267 (characterizing surrogate motherhood as “more a reproductive arrangement than a reproductive technology. It may require neither physician nor complicated equipment.”); JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 63 (1997) (stating that “surrogacy is not really an instance of reproductive technology although it is almost always considered and discussed as if it were”); JOHN YEH & MOLLY ULIN YEH, LEGAL ASPECTS OF INFERTILITY 125 (1991) (asserting that surrogacy does not usually involve the use of technology).

<sup>2</sup> Infertility is defined as “the inability of a couple to conceive after 12 months of intercourse without contraception.” OTA REPORT, *supra* note 1, at 1. See YEH & YEH, *supra* note 1, at 1 (stating that the above definition is the most commonly accepted). While generally it is either the man or the woman who is infertile, infertility is usually characterized as afflicting the couple. See OTA REPORT, *supra* note 1, at 4 (“Fertility is the product of interaction between two people and so the infertile patient is in effect the infertile couple.”) (emphasis in original); Machelle M. Seibel, *Medical Evaluation and Treatment of the Infertile Couple*, in TECHNOLOGY AND INFERTILITY: CLINICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL ASPECTS 11–12 (1993) (asserting that infertility is different from all other medical conditions in that one diagnosis affects two people).

childless or they could seek to adopt.<sup>3</sup> Technological advances in medical and genetic procedures have made available different familial relationships and compositions that were once thought impossible.<sup>4</sup> Surrogacy<sup>5</sup> is one alternative to traditional repro-

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<sup>3</sup> A couple seeking to adopt a child is not guaranteed success. See NOEL P. KEANE & DENNIS L. BREO, *THE SURROGATE MOTHER* 13 (1981) (positing that fewer babies are available for adoption due to the alternatives of abortion and the pill); YEH & YEH, *supra* note 1, at 139 (stating that there are fewer children to adopt due to the larger number of unmarried pregnant women keeping their babies, the legalization of abortion, and the use of contraceptives); Barbara Eck Manning, *Historical Perspective of the Infertile Experience*, in *TECHNOLOGY AND INFERTILITY: CLINICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL ASPECTS* 271-72 (1993) ("Today 90 to 95% of all single mothers and women pregnant out of wedlock keep their babies . . . . Therefore [ ] couples [are] less able to turn to adoption as an easy alternative . . . .").

<sup>4</sup> See ROBERTSON, *supra* note 1, at 3, 5 (suggesting that the "reproductive revolution" is "changing the reproductive landscape and challenging basic notions about procreation, parenthood, family, and children"); Christine Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 114 (1997) (noting that "[t]he growing prevalence of alternative reproductive technologies . . . challenges contemporary society's traditional notion of the nuclear family . . ."). For example, cryopreservation, the freezing of sperm, eggs, or embryos has made it possible for a child to be born from the gametes of a dead person. See, e.g., DOLGIN, *supra* note 1, at 2 (stating that today an embryo "may be frozen and stored for months, or even years, and then thawed for implantation and gestation . . . . [B]abies may be born years after the deaths of their genetic 'parents'"); George J. Annas, *Fertility Clinics Hardly Letter-Perfect*, BOSTON GLOBE, Nov. 30, 1997, at D1, available in 1997 WL 6283271 (listing "the collection and use of sperm from corpses" as one of the reproductive technologies currently being used); Judy Peres, *A Mother Beyond the Grave? Parents Have Ova of Dead Daughter Planted in Surrogate*, SEATTLE TIMES, Dec. 15, 1997, at A1, available in 1997 WL 16507193 (describing the ethical, social, and legal questions raised by posthumous reproduction).

<sup>5</sup> The surrogacy relationship is defined by an "[a]greement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband; she is to conceive a child, carry the child to term and after the birth, assign her parental rights to the birth father and his wife." BLACK'S LAW DICTIONARY 1445 (6th ed. 1990). There are now two forms of surrogacy arrangements: " 'traditional' surrogacy" and " 'gestational' surrogacy." See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) (describing the two forms of surrogacy).

Traditional surrogacy is encompassed by the above definition and is the most common form of surrogate arrangement. Here, the intended father and the surrogate mother are genetically related to the child. See *id.*; OTA REPORT, *supra* note 1, at 267; DOLGIN, *supra* note 1, at 64 (describing traditional surrogacy arrangements); KEANE & BREO, *supra* note 3, at 12. Once the child is born, the intended mother usually adopts the child. See OTA REPORT, *supra* note 1, at 281 (stating that surrogacy contracts usually require the intended mother to adopt the child); YEH & YEH, *supra* note 1, at 127. Further, in some cases both the genetic father and the intended mother may have to adopt the child. See *id.* Alternatively, gestational surrogacy involves in vitro fertilization, whereby the embryo, formed with either the sperm and egg of the intended parents or with donated gametes, is then transplanted into the surrogate. See OTA REPORT, *supra* note 1, at 267; PETER SINGER &

duction that has become increasingly popular over the past few years.<sup>6</sup> Although new reproductive methods enable couples who were at one time destined to remain childless to begin a family, the law has not advanced at the same pace.<sup>7</sup> Many legislatures

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DEANE WELLS, MAKING BABIES 96 (1985) (describing gestational surrogacy as "full surrogacy" or as a "true surrogate pregnancy").

Interestingly, although IVF and cryopreservation have been available since the 1980s, and the first successful birth from a gestational surrogacy arrangement occurred in 1985, little attention has been given to this form of surrogacy. See OTA REPORT, *supra* note 1, at 127–28 (describing cryopreservation); Seibel, *supra* note 2, at 22 (stating that the availability of IVF became widespread in the 1980s); see also *id.* at 36. As of the printing of the sixth edition of Black's Law Dictionary in 1990, gestational surrogacy was not included in the definition of surrogacy. The dictionary does, however, define both "surrogate mother" and "surrogate parenting agreement" without reference to gestational surrogacy. See BLACK'S LAW DICTIONARY 1445 (6th ed. 1990). Even as late as 1997, gestational surrogacy arrangements involving anonymously donated material were described in legal writings as hypothetical only. See, e.g., Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1226 (1997) (referring to hypothetical contracting parents as "Romeo and Juliet"). Cf. YEH & YEH, *supra* note 1, at 125 (defining gestational surrogacy as the impregnation of the surrogate with an embryo formed from the sperm and egg of the intended parents, but not including gamete donors as a possibility). It will be shown that this hypothetical situation gave rise to real consequences for which no one was prepared. See *infra* notes 13–29 and accompanying text.

<sup>6</sup> See OTA REPORT, *supra* note 1, at 267–68 (reporting that the Baby M litigation "thrust surrogate motherhood squarely into the national consciousness" and increased inquiries into surrogate matching services); Lori B. Andrews & Wendy K. Mariner, *National Conference on Birth, Death, and Law*, 26 JURIMETRICS J. 403, 415 (1989) (acknowledging that surrogacy arrangements have become more visible because of the Baby M case); Keith J. Hey, *Assisted Conception and Surrogacy—Unfinished Business*, 26 J. MARSHALL L. REV. 775, 776 n. 3 (1993) (stating that since the mid-1980s, surrogacy arrangements have become a popular issue for the general public).

Although the popularity of surrogacy arrangements is relatively new, it is one of the oldest forms of reproductive methods. See DOLGIN, *supra* note 1, at 64 (describing the biblical event of the birth of Abraham's son through the use of Sara's servant as a surrogate mother); SINGER & WELLS, *supra* note 5, at 93 (acknowledging that surrogate motherhood has been used since Biblical times and is not really a new reproductive method).

<sup>7</sup> See, e.g., Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 SETON HALL LEGIS. J. 103, 115–16 (1998) ("Because the issues surrounding reproductive rights are emotional and controversial, most lawmakers are hesitant to enact laws that regulate assisted reproduction or restrict an individual's fundamental right to procreate."); Jerald V. Hale, Note, *From Baby M. to Jaycee B.: Fathers, Mothers, and Children in the Brave New World*, 24 J. CONTEMP. L. 335, 336 (1998) (noting the "widening gap" between medical technology and the law concerning assisted reproduction); Annas, *supra* note 4, at D1 (criticizing the current lack of regulation in the reproductive industry and lack of protection for children born through these practices, and asserting that "it will take federal legislation to move

have failed to enact laws<sup>8</sup> governing these medical practices and surrogacy arrangements;<sup>9</sup> rather, they rely on the courts to handle disputes on a case by case basis.<sup>10</sup> Until recently, surrogacy cases involving a dispute over parentage have involved at least one person who was genetically related to the child and could therefore exert legal parental rights.<sup>11</sup> In fact, in most cases, the child has had *too many* parents.<sup>12</sup> *Jaycee B. v. Superior Court of*

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children to the center of consideration in the infertility business"); David E. Loder & Lisa W. Clark, *In Gestational Surrogacies, All Parties Must Bear Risk—A Child Genetically Related to Both Parents Can Be Born To A Surrogate, Raising Myriad Legal Issues Governed by Nascent Statutes*, NAT'L L.J., Sept. 9, 1996, at B7 ("Many of these issues are only beginning to be addressed by the legislatures and courts. The result is a confusing patchwork of laws and practices."); David E. Rovella, *Six Degrees of Parental Separation, California Appeals Court to Hear Donor-Surrogacy Case*, NAT'L L.J., Oct. 27, 1997, at A7 (stating that the law has adapted to new reproductive technologies at a slow pace).

<sup>8</sup> See Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 294 (1997) (noting that most states have failed to legislate in the area of in vitro fertilization); Hale, *supra* note 7, at 344 n.62 (listing 32 states that have not enacted surrogacy laws); Loder & Clark, *supra* note 7, at B10 (noting that there is "a large number of states that have not yet spoken on surrogacy, including Maryland, Oregon, Georgia, Pennsylvania, Texas, and Vermont").

<sup>9</sup> Surrogacy agreements have been called both social and contractual arrangements. Those that are contractual in nature usually involve a fee to be paid to the surrogate for carrying the child. The surrogate may be a person not known by, or related to, the intended parents. There are a number of surrogate matching services that will provide a prospective couple with lists of available surrogates. See OTA REPORT, *supra* note 1, at 267, 270 (describing commercial surrogacy arrangements and discussing surrogate matching services); YEH & YEH, *supra* note 1, at 126. In some states, the payment of a fee to a surrogate is illegal. Therefore, couples often leave the state in order to obtain a surrogate agreement. See SINGER & WELLS, *supra* note 5, at 95 (noting that "without offering a fee it could take a long time to find a woman who would act as a surrogate"). Surrogacy agreements that are termed social arrangements are those where there is no fee involved, and the surrogate may be a friend of, or related to, the intended parents. See DOLGIN, *supra* note 1, at 65. Further, the surrogate in such a social arrangement may have purely altruistic reasons for engaging in the contract. See *infra* note 67.

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *Jaycee B. v. Superior Ct.*, 49 Cal. Rptr. 2d 694, 695 (Ct. App. 1996) (noting that "this surrogacy case would seem to be the most extraordinary to date").

<sup>12</sup> See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (involving a surrogate who carried child who was biologically related to both intended parents and claimed parental rights to child); *In re Baby M*, 542 A.2d 52 (N.J. Super. Ct. Ch. Div. 1988) (involving a surrogate who was artificially inseminated with sperm of intended father and claimed parental rights to child); see also *McDonald v. McDonald*, 608 N.Y.S.2d 477 (2d Dep't 1994) (describing divorce action whereby children born from sperm of intended father/husband and egg of a female donor implanted in mother/wife were claimed to be children of father, but not gestational mother/wife); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994) (involving a father

*Orange County*<sup>13</sup> involved the situation courts and commentators were dreading.<sup>14</sup> The legal fate of children born pursuant to gestational surrogacy arrangements could no longer be avoided.

John and Luanne Buzzanca entered into a gestational surrogacy contract with a surrogate and her husband. Pursuant to the contract, a sperm and an egg from anonymous donors were united and implanted in the surrogate, who was to carry the fetus to term and then release the baby to the intended parents, John and Luanne.<sup>15</sup> The contract was signed by John and Luanne Buzzanca, and by the surrogate and her husband.<sup>16</sup> One month prior to the child's birth John Buzzanca filed for divorce and alleged that "there were no minor children" from the marriage. Luanne Buzzanca filed a response stating that although there were presently no minor children, she and John were "expecting a child by way of surrogate contract."<sup>17</sup> Jaycee Louise Buzzanca was born on April 26, 1995, and was given to Luanne by the surrogate in accordance with the contract terms. Luanne then filed for sole custody of Jaycee and sought pendente lite child support payments from John while awaiting final adjudication of the divorce action.<sup>18</sup> John acknowledged that he signed the contract, but declared that the California Family Court lacked jurisdiction to force him to pay because Jaycee was not a "child of the marriage" within the meaning of the California Family Code.<sup>19</sup> The trial court concluded it did not have jurisdic-

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and surrogate mother of a child born through traditional surrogacy arrangement who both sought custody based on genetic link to child).

<sup>13</sup> 49 Cal. Rptr. 2d 694 (Ct. App. 1996).

<sup>14</sup> See Judy Peres, *Surrogacy Case Breeds New Legal Dilemma*, CHI. TRIB., Sept. 11, 1997, at 1, available in 1997 WL 3587510 ("This is the nightmare case that everyone was dreading.") (quoting R. Alta Charo, Professor of Law and Medical Ethics at the University of Wisconsin).

<sup>15</sup> See *Jaycee*, 49 Cal. Rptr. 2d at 697. The contract stated that "[t]he child [was] to be taken into the home of the Intended Father and Intended Mother and raised by them as their child, without interference by the Surrogate [Pamela] or her husband, and without retention or assertion by the Surrogate and her husband of any parental rights." *Id.* (internal quotes omitted).

<sup>16</sup> See *id.* In most surrogacy arrangements, the husband of the surrogate must expressly refuse to consent to the insemination of his wife. This is because the law in most jurisdictions presumes that the husband of a woman who gives birth is the legal father of the child. See OTA REPORT, *supra* note 1, at 273; DOLGIN, *supra* note 1, at 65.

<sup>17</sup> *Jaycee*, 49 Cal. Rptr. 2d at 697.

<sup>18</sup> See *id.* at 696-97.

<sup>19</sup> *Id.* at 696. California Family Code section 2010 states, in pertinent part:

In a proceeding for dissolution of marriage . . . the court has jurisdiction to

tion over John, and thus he was not required to make any support payments for Jaycee.<sup>20</sup> Further, the trial judge asserted that in order for Luanne to prevail, she would need to get a probate court decree declaring that she and John had legally adopted Jaycee.<sup>21</sup> The trial court postponed a final determination pending review.<sup>22</sup>

In a detailed opinion, the California Court of Appeals reversed the trial court decision and declared that the family court had jurisdiction to impose pendente lite child support payments on John Buzzanca.<sup>23</sup> The court held that Luanne had made a sufficient showing that John would likely be held to be Jaycee's father.<sup>24</sup> In granting Luanne's application, the court relied on

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inquire into and render any judgment and make orders that are appropriate concerning the following:

(a) . . . .

(b) The custody of minor children of the marriage.

(c) The support of children for whom support may be ordered, including children born after the filing of the initial petition or the final decree of dissolution.

CAL. FAM. CODE § 2010 (Deering Supp. 1999).

<sup>20</sup> See *Jaycee*, 49 Cal. Rptr. 2d at 697.

<sup>21</sup> See *id.* at 696. The trial judge neglected to address the fact that John could not be forced to adopt Jaycee. See *id.* The difficulties this "remedy" poses are discussed *infra* note 31.

<sup>22</sup> See *Jaycee*, 49 Cal. Rptr. 2d at 696.

<sup>23</sup> See *id.* at 702.

<sup>24</sup> In its discussion, the court first established that it was not deciding whether John conclusively was Jaycee's father, nor was it deciding the legal effect of the surrogacy contract. See *id.* at 700-01. Significantly, there is a distinction between deciding a factual dispute, on the one hand, and deciding the legal effect of an event, on the other, in determining whether pendente lite support should be granted. Where there is a factual dispute, the moving party must first establish the existence of the fact by a preponderance of the evidence before pendente lite support will be ordered. See *id.* at 700; *Hite v. Hite*, 57 P. 227, 228-29 (Cal. 1899) (holding that in a pendente lite application for alimony where the "husband" denies the existence of the marriage, the "wife" must prove its existence by a preponderance of the evidence before she can receive support). Alternatively, where there is no factual dispute as to an event but the legal significance of the event is in question, pendente lite support will be granted if the event is sufficient to show, by a preponderance of the evidence, the claimant's assertion. The undisputed existence of facts pertaining to the event is enough to grant the order, even though a court may later determine the event is legally invalid. See *Jaycee*, 49 Cal. Rptr. 2d at 700; *Bancroft v. Bancroft* 50 P.2d 465, 468 (Cal. Ct. App. 1935) (holding that in a pendente lite proceeding for alimony, because the legal significance of a marriage was in question but not its factual existence, the court was justified in granting the support application). In reaching its decision, the court in *Bancroft* stated, "there will not be need that the fact . . . be so conclusively established . . . . It is for the interest of society and in aid of public policy that, where the . . . relation has been in fact assumed, it should not easily and capriciously be laid aside." *Id.* at 467 (quoting *Brinkley v. Brinkley*, 50

the only gestational surrogacy case decided by the California Supreme Court to date, *Johnson v. Calvert*.<sup>25</sup> The *Johnson* court ultimately relied on the intention of the parties to the surrogacy contract to determine the legal parentage of the child born pursuant to the contract.<sup>26</sup> The *Jaycee* court read the holding of *Johnson* broadly to conclude that the intentions of John and Luanne to raise Jaycee, coupled with the intention of the surrogate not to raise Jaycee, were sufficient to show that John would most likely be deemed Jaycee's father.<sup>27</sup> Therefore, the court was justified in granting the pendente lite child support application.

When the custody issue subsequently went before the trial judge, he "reached an extraordinary conclusion: Jaycee had no lawful parents."<sup>28</sup> He ordered that John Buzzanca was not Jaycee's legal father,<sup>29</sup> and was therefore not required to make any further child support payments for her to Luanne.<sup>30</sup> Additionally,

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N.Y. 184, 193-94 (1879)). This quote seems extremely appropriate here, as a contrary decision would deprive Jaycee of the immediate support that is owed to her, and more importantly, that she needs and deserves.

Here, had John denied the existence of the contract, Luanne would have been obligated to show by a preponderance of the evidence that he was Jaycee's father. This would have been virtually impossible absent the signed contract, because John is not genetically linked to Jaycee. Since it was undisputed that John Buzzanca signed the contract, the court needed to determine merely whether he would likely be held to be Jaycee's father given the signed surrogacy agreement. See *Jaycee*, 49 Cal. Rptr. 2d at 700-01. As this was a pendente lite application for child support, the court had to decide whether, given the signed surrogacy agreement, "it [was] likely that John [would] ultimately be held to be the father." *Id.* at 701.

<sup>25</sup> 851 P.2d 776 (Cal. 1993). For a factual description of the *Johnson* case, see *infra* note 89 and accompanying text.

<sup>26</sup> See *Johnson*, 851 P.2d at 782.

<sup>27</sup> See *Jaycee*, 49 Cal. Rptr. 2d at 702. Another complicating aspect of this case was that the only person who could claim legal rights to Jaycee, the surrogate mother, did not want to exercise those rights. See *id.* at 701 (noting that the surrogate mother "never contemplated keeping the child"); *Buzzanca v. Buzzanca*, No. 95D002992 (Cal. Fam. Ct. Aug. 29, 1997) (discussing how Pamela and Randy Snell voluntarily abandoned their petition to establish parentage, and verifying that they had no biological and genetic relationship to Jaycee); see also Peres, *supra* note 14, at 1 (reporting on the *Jaycee* case and stating that "the birth mother [ ] irrevocably waived her claim"); Rovella, *supra* note 7, at A7 (stating that the surrogate and her husband had at first sought custody, but then dropped their claim).

<sup>28</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (1998). The trial court had accepted the stipulation that neither the surrogate mother nor her husband were the "biological" parents. See *id.* Luanne was deemed not to be the mother because she had neither contributed the egg nor given birth. See *id.*

<sup>29</sup> John was not the father because he had not contributed the sperm and thus had no biological relationship with Jaycee. See *id.*

<sup>30</sup> See *id.*



the court ordered that Luanne Buzzanca was not entitled to be declared Jaycee's legal mother.<sup>31</sup>

When Jaycee's case came back to the California Appellate Court, the trial judge, not surprisingly, reversed the ruling and John and Luanne were declared Jaycee's legal parents.<sup>32</sup> Based on an analogy to California's artificial insemination statute, the court held:

The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here . . . . Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf.<sup>33</sup>

The appellate court criticized the family court judge for reading the California Family Code too narrowly and for reaching the ludicrous result of putting the burden of Jaycee's support on the taxpayers, while at the same time relieving John and Luanne of any responsibility to her.<sup>34</sup> Under California Family Code section 7610(a), a parent-child relationship can be established between the mother and the child by "proof of [the mother]

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<sup>31</sup> See *id.* The trial judge relied on California Family Code Section 7611(d) and determined that even if Luanne might be presumed the mother, the presumption was rebutted by clear and convincing evidence. See *id.* The "evidence" relied upon to make this determination was the lack of a genetic link between Luanne and Jaycee, that Luanne did not give birth to Jaycee, and had made no attempt to adopt her. See *id.* Section 7611(d) of the California Family Code relates to presumption of paternity and provides that "[a] man is presumed to be the natural father of a child if he meets the conditions provided . . . in any of the following subdivisions: . . . (d) He receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE § 7611(d) (Deering 1996). The trial judge declined to apply this provision to Luanne stating that "[t]here are inherent differences between men and women as to the application of § 7611(d)." *Buzzanca*, at 3.

It appears illogical for Luanne to have to adopt Jaycee to become her legal mother. If she does, then it follows that John has to adopt her as well to become the legal father. This procedure allows these "fathers," or mothers if it were the case, to escape any obligations to the child by simply refusing to adopt, since a court cannot force the adoption. See *supra* note 21. Luanne Buzzanca and the guardian ad litem for Jaycee appealed this decision to the California Court of Appeals. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); see also *infra* notes 32-44 and accompanying text.

<sup>32</sup> See *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 280. The same justice who had written the first appellate opinion wrote this opinion as well. See *Jaycee B. v. Superior Ct.*, 49 Cal. Rptr. 2d 694 (Ct. App. 1996).

<sup>33</sup> *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 282.

<sup>34</sup> See *id.*

having given birth to the child, or *under this part*.”<sup>35</sup> As between the father and the child, section 7610(b) provides that proof of the relationship can be established, “*under this part*.”<sup>36</sup> The court held that “under this part” included the artificial insemination section of the Family Code, which provides that as long as the husband consents to his wife’s artificial insemination, the husband becomes the natural father of the resulting child under the law.<sup>37</sup> The court concluded that although only the husband was mentioned, the statute could be extended to include both husbands and wives who consent to in vitro fertilization of a surrogate using a sperm and egg from anonymous donors.<sup>38</sup> The court stated that although this procedure was not contemplated by the legislature, gestational surrogacy was similar to artificial insemination in that “[b]oth contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie.”<sup>39</sup> The court decided that since the legislature did provide for a form of artificial reproduction where at least one parent had no biological tie to the child, it should naturally be applicable to the situation where neither parent has a biological connection.<sup>40</sup>

Once the appellate court determined that Luanne could establish maternity under the relevant statutes, it next had to determine which of the two people who could claim parental status, the surrogate or Luanne, should be declared Jaycee’s legal mother.<sup>41</sup> Relying on *Johnson v. Calvert*,<sup>42</sup> the court used the intent to procreate standard to “break the tie” and declare Luanne Jaycee’s legal mother.<sup>43</sup> Additionally, the court held that John’s

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<sup>35</sup> CAL. FAM. CODE § 7610(a) (Deering 1996 & Supp. 1998) (emphasis added).

<sup>36</sup> *Id.* § 7610(b). See *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 284 (setting forth the statute’s relevant portion).

<sup>37</sup> See *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 285 (noting that a genetic relationship is not necessary, as there are other ways to establish paternity under the code).

<sup>38</sup> See *id.* at 282 (stating “[in] each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The only difference is that in this case—unlike artificial insemination—there is no reason to distinguish between husband and wife”).

<sup>39</sup> *Id.* at 286.

<sup>40</sup> See *id.*

<sup>41</sup> As stated earlier, the surrogate could claim legal status because she had given birth to Jaycee. See *supra* note 27.

<sup>42</sup> 851 P.2d 776 (Cal. 1993).

<sup>43</sup> See *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 288. The court stated that

paternity was established in the same manner as Luanne's maternity. Thus, he was unable to escape his parental responsibilities of providing for the child he created.<sup>44</sup>

The decision of the Orange County Family Law Court judge presents the clearest example of the legal system's deficiency in the area of gestational surrogacy.<sup>45</sup> It is abhorrent that a two year old child could be declared a legal orphan when the people who brought about her existence were alive and perfectly capable of supporting her.<sup>46</sup> Specifically, in California the validity and enforceability of surrogacy contracts has volleyed between the courts and the legislature.<sup>47</sup> The courts have made individual case determinations, but have deferred the regulatory question to the legislature.<sup>48</sup> In turn, when the legislature attempted to pass a regulatory law, the governor vetoed it stating, "[o]nly two published court opinions in California have treated this nettlesome subject . . . . Comprehensive regulation of this difficult

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Luanne's situation was not a true tie-breaker because the surrogate had made no attempt to gain custody of Jaycee. *See id.* More importantly, the surrogate had specifically relinquished all possible claims to her. *See supra* note 29.

<sup>44</sup> *See Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 294.

<sup>45</sup> One argument has been made that declaring a child a "legal orphan" denies the child equal protection under the laws. *See Doe v. Doe*, 710 A.2d 1297, 1304 (Conn. 1998) (claiming that the trial court's failure to assert jurisdiction over the custody proceeding was a denial of the child's equal protection right).

<sup>46</sup> There is no evidence in either the appellate decision or the trial order that would call into question the capability of either John or Luanne to support Jaycee. *See Jaycee B. v. Superior Ct.*, 49 Cal. Rptr. 2d 694 (Ct. App. 1996); *Buzzanca v. Buzzanca*, No. 95D002992 (Cal. Fam. Ct. Aug. 29, 1997).

Although Jaycee technically would not have been born without the anonymous sperm and egg donors and the surrogate Pamela, this author does not consider them to be the people who brought about her birth. While any sperm/egg combination and any healthy, willing surrogate would have been adequate to cause the birth of a child, it was *specifically* John and Luanne Buzzanca who desired a child and *sought out* a surrogate who gave birth to Jaycee. *See* John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991) (arguing that while any gestational host or gamete provider will suffice to produce a child, only the intended parents "stand [ ] in the relationship with the child of being the *but for* cause of the child's existence") (emphasis in original).

<sup>47</sup> *See Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293 (calling on the legislature to give guidance in the area of gestational surrogacy); *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993) (noting that the legislature should be called upon to resolve this issue).

<sup>48</sup> As in its prior decision, the appellate court here was not concerned with the enforceability or validity of the surrogacy contract. Rather, it was "concerned with the consequences of those agreements as acts which caused the birth of a child." *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 289.

moral issue is premature . . . . To the extent surrogacy continues to be practical, it can be governed by the legal framework already established in the family law area."<sup>49</sup>

To protect fully the welfare of children born pursuant to gestational surrogacy contracts, the procedure must be regulated and uniform legislation should be imposed.<sup>50</sup> Moreover, legislation would ensure that the parties to the contract are aware of their rights and responsibilities before they enter the contract and before the child is born, and would create consistency and predictability for future parties who choose this reproductive method. The moral issues associated with gestational surrogacy, while clearly of utmost importance, are beyond the scope of this paper. The fact remains that children *are* born using these methods and, thus, their physical and emotional well-being must be protected to the greatest extent possible. This is true regardless of whether these contracts are ultimately held to be legal.

Part I of this Comment addresses a proposed argument for the constitutional validity of surrogacy contracts. Part II examines the current state of surrogacy in our legal system, and the different ways courts and legislatures have addressed the issues that have come before them. Part III analyzes the *Buzzanca* decision and argues that in the absence of a state regulation, the intent to procreate standard should be used to protect the interests of a child born through a gestational surrogacy arrangement. Part IV asserts that uniform legislation is urgently needed to prevent outcomes detrimental to children such as Jaycee, who are born pursuant to gestational surrogacy arrangements.

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<sup>49</sup> *Johnson*, 851 P.2d at 783 (quoting Governor Wilson's veto message, SEN. BILL No. 937 (Sept. 26, 1992) Sen. Daily File (1991-92 Reg. Sess.) p. 68); *id.* at 787 (declaring "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so . . . . [r]ather, our task has been to resolve the dispute before us"); *id.* at 788 (Arabian, J., concurring) (cautioning "I would not move beyond the available legal mechanism into such socially and morally uncharted waters . . . . To date, the legislative process has failed to produce a satisfactory answer. This court should be chastened and not emboldened by that failure").

<sup>50</sup> See Hey, *supra* note 6, at 811 (stating that "[s]tatutory enactments on surrogacy arrangements should not be adopted in a vacuum; such legislation needs to be part of a thorough statutory scheme regulating both the medical technologies and the contractual aftermaths"); see also *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293 (declaring that the legislature should enact laws regulating these methods of reproduction because it is better suited to "lawmaking" than the courts, and legislation would create predictability for parties who use these reproductive methods).

# I. CONSTITUTIONAL ISSUES SURROUNDING SURROGACY CONTRACTS

The United States Supreme Court has not yet been faced with deciding the legality of either of the two types of surrogacy contracts.<sup>51</sup> As a result, unanswered questions remain concerning the constitutionality of surrogacy contracts in their relation to the fundamental rights of procreation and privacy. The right to procreation has been interpreted as a basic human fundamental right implied by the United States Constitution.<sup>52</sup> The Supreme Court has also concluded that the constitutional right of privacy includes the right to procreate.<sup>53</sup> One argument supporting the constitutionality of surrogacy contracts is that if one has the freedom to procreate, then by extension one should also have the freedom to choose how procreation will occur.<sup>54</sup> This ar-

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<sup>51</sup> See *supra* note 5 and accompanying text (describing the two types of surrogacy arrangements).

<sup>52</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding unconstitutional a state statute that permitted involuntary sterilization of criminals); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating in dicta that an individual has a constitutional right to "marry, establish a home and bring up children"). The *Skinner* Court stated, "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541. The result of allowing one to be involuntarily sterilized is that one would be "forever deprived of a basic liberty." *Id.*

<sup>53</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original). This holding was an extension of *Griswold v. Connecticut*, in which the Court held that a state law forbidding the use of contraceptives by married couples was "unconstitutionally intrud[ing] upon the right of marital privacy." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

<sup>54</sup> See John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 410 (1983) (stating that "[there is] an important distinction about procreative freedom: choices about who may conceive, bear, or rear a child are distinct from choices about the conduct that occurs in the process of conceiving, bearing, and rearing. In other words, the freedom to procreate is distinct from freedom *in* procreation.") (emphasis in original). Furthermore, that freedom "may be of great significance to individuals and may also deserve protection." *Id.*; see also *In re Baby M.*, 525 A.2d 1128, 1164 (N.J. Super. Ct. Ch. Div. 1987) (asserting that "if one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected"). Although the New Jersey Supreme Court ultimately found the surrogacy contract invalid, see *In re Baby M.*, 537 A.2d 1227, 1240 (N.J. 1988), the lower court's discussion of the constitutional issues surrounding surrogacy contracts is a strong argument for their validity and enforceability. Additionally, see *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (upholding contract between parties relating to disposition of frozen pre-zygotes and stating,

gument appears to have merit when one considers that infertile couples have the same desires to have and to raise children of their own as do fertile couples.<sup>55</sup> Infertile couples should not be forced to give up their fundamental right to procreate when available medical technology and social agreements can allow them to enjoy the same rights as couples who are fertile.<sup>56</sup> As one state court stated, "[t]o the extent possible, it should be the progenitors—not the state and not the courts—who by their prior directive make this deeply personal life choice."<sup>57</sup> Moreover, should gestational surrogacy contracts ultimately be viewed as a way of equating infertile couples with fertile couples, the Equal Protection Clause of the Fourteenth Amendment would prevent a state from banning or unduly restricting their use, absent a compelling state interest.<sup>58</sup>

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"[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision").

<sup>55</sup> See Robertson, *supra* note 54, at 428 (stating that "[a]n infertile couple's interest in genetic continuity, in gestating and giving birth, and in rearing the offspring is identical to the interest of a fertile couple"); *Baby M.*, 525 A.2d at 1164 (positing that "[t]he value and interests underlying the creation of family are the same by whatever means obtained").

<sup>56</sup> See Robertson, *supra* note 54, at 428 (asserting that "[b]ecause fertile married persons have the right to add children to the family, infertile married persons must have it as well: a legal distinction based on the natural lottery of physical equipment is not reasonable"). In his article, Professor Robertson argues that freedom in procreation should also extend to allow infertile couples to use assisted reproductive technology to select the gender and genetic characteristics of their child. See *id.* at 430. This is not a proper purpose for using assisted reproductive technologies. If people who can reproduce by coital techniques do not have the option of choosing which traits are passed on to their child, then couples who seek to use non-coital techniques should not have that option either. Non-coital techniques should only be used to enable infertile couples to achieve equal footing with those who are able to exercise the constitutional right of freedom to procreate. The moral issue of tailoring embryos with more desirable genetic traits and characteristics, however, is beyond the scope of this Comment.

<sup>57</sup> *Kass*, 696 N.E.2d at 180 (upholding intent of parties as stated in contract to determine disposition of cryopreserved pre-zygotes).

<sup>58</sup> See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (declaring that classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons are similarly circumstanced shall be treated alike") (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). But see *Kass*, 696 N.E.2d at 177 (asserting, in a custody dispute over cryopreserved zygotes, that a woman's right to privacy and bodily integrity is not at issue until zygote implantation occurs); *Doe v. Atty. Gen. of Michigan*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992) (concluding that the legislature has a compelling interest in regulating surrogacy contracts sufficient to

This paper may appear contradictory in suggesting that gestational surrogacy contracts may be constitutional as an extension of the right to procreate, while simultaneously arguing that uniform legislation is needed to govern their use and to protect the children born pursuant to such contracts. Regulating surrogacy contracts, however, would not infringe upon one's constitutional right to freedom of procreation. Rather, it protects the children born as a result of these contracts *after procreation has already occurred*.<sup>59</sup> In the *Buzzanca* case, Luanne and John Buzzanca exercised their fundamental right to procreate through the use of a surrogacy contract. To prevent Jaycee from being deprived of the responsibility owed to her by John and Luanne, the couple's intent to bring about her existence had to be the determinative factor in deciding her legal parentage after her conception. Additionally, legislation is necessary to prevent "fathers" like John Buzzanca from escaping their parental responsibilities to a child they are responsible for creating.<sup>60</sup> Unfortunately, until the Supreme Court decides this constitutional issue, the individual states will continue to determine the validity of these arrangements. Some states may continue to provide for the welfare of a child created through surrogacy contracts, regardless of their validity.

## II. THE TANGLED WEB OF SURROGACY LAWS

### A. State Legislation

State legislation concerning surrogacy contracts varies widely. Some states explicitly allow surrogacy contracts,<sup>61</sup> while

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justify intruding upon a person's right to procreate).

<sup>59</sup> See OTA REPORT, *supra* note 1, at 223 (declaring that although a right may be deemed fundamental, it may still be subject to regulation by the state); Robertson, *supra* note 54, at 433 (acknowledging that even if the right to procreation includes the right to use non-coital methods, that right is not unlimited and may be subject to state regulation if there is a compelling state interest).

<sup>60</sup> Similarly, mothers who seek to evade their obligations under a surrogacy contract should be prevented from doing so as well.

<sup>61</sup> See e.g., FLA. STAT. ANN. § 742.15 (West 1997) (providing for gestational surrogacy contracts only when the intended mother cannot gestate a child, or to do so would present a serious health risk to either her or the child). The statute further provides that any surrogacy contract must contain provisions which state that the gestational surrogate agrees to relinquish all parental rights to the child upon birth, and the intended parents are to assume all parental rights and responsibilities upon the child's birth regardless of whether the child has any impairment. See *id.*; see

others explicitly prohibit them.<sup>62</sup> Those prohibiting surrogacy may, in some cases, also attach civil or criminal penalties to persons entering into these arrangements.<sup>63</sup> Interestingly, the majority of states have not addressed surrogacy at all.<sup>64</sup> For example, California adopted the Uniform Parentage Act, which was enacted specifically to abolish the distinction of children's rights based on their legitimate or illegitimate status, and instead determines rights and responsibilities based on whether a parent-child relationship exists.<sup>65</sup> The Uniform Parentage Act was not meant to deal with parentage issues in surrogacy contracts. In fact, surrogacy was not even contemplated by its drafters.<sup>66</sup> Thus, although the trial judge in *Buzzanca* erred in his decision,

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also WASH. REV. CODE ANN. §§ 26.26.210–26.26.260 (West 1997) (allowing surrogacy contracts except when the surrogate mother is under the age of 18 or suffers from a mental illness or disability); ARK. CODE ANN. § 9-10-201 (Michie 1998) (providing for the legality of surrogacy contracts where the surrogate is artificially inseminated).

<sup>62</sup> See, e.g., N.Y. DOM. REL. LAW § 122 (McKinney 1988 & Supp. 1998) (declaring that surrogate parenting arrangements are contrary to public policy and are therefore void and unenforceable); UTAH CODE ANN. § 76-7-204 (Michie 1995) (stating that any artificial or assisted method of reproduction is illegal). In Utah, if a child is born pursuant to an illegal surrogacy contract, the child is considered the legal child of the gestating mother and if she is married, her husband is the legal father. See UTAH CODE ANN. § 76-7204(3); see also ARIZ. REV. STAT. ANN. § 25-218 (West 1991 & Supp. 1998) (providing that surrogacy arrangements are prohibited, and any child born pursuant to such an arrangement is the child of the surrogate mother). In 1994, however, this statute was declared unconstitutional by the Court of Appeals of Arizona in *Soos v. Superior Court of Maricopa County*, 897 P.2d 1356, 1361 (Ariz. App. 1994).

<sup>63</sup> See, e.g., N.Y. DOM. REL. LAW § 123 (McKinney 1998 & Supp. 1998) (imposing a civil penalty on any party that attempts to engage in a surrogacy contract for a fee); UTAH CODE ANN. § 76-7-204(1)(d) (declaring that violation of this section is a class B misdemeanor); see also MICH. STAT. ANN. §§ 25.248(155)–(159) (Law. Co-op. 1992) (declaring surrogacy contracts void and unenforceable as against public policy, and making a violation of the law a felony). Cf. WASH. REV. CODE ANN. § 26.26.250 (allowing the enforcement of surrogacy contracts but making the entrance into a surrogacy contract for money a gross misdemeanor).

<sup>64</sup> See generally Loder & Clark, *supra* note 7, at B7 (giving examples of various state statutes governing surrogacy); The American Surrogacy Center, TASC Legal Map at <<http://www.surrogacy.com/legals/map.html>> (showing what the position each state has taken on surrogacy, whether it has been banned, allowed, or not addressed).

<sup>65</sup> See UNIFORM PARENTAGE ACT, Prefatory Note, 9B U.L.A. 287, 289 (West 1987) (noting that the Act provides substantive legal equality for children, no matter what the marital status of their parents); *id.* § 2 at 296 (stating that both legitimate and illegitimate children are extended equal parent and child relationships).

<sup>66</sup> See *id.* § 5 at 302 (indicating that this Act does not reach many of the complex problems involved with artificial insemination); *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993) (realizing that since surrogacy was unknown in 1975 when the Act was passed, it could not have been a motivation for the drafters).



it is understandable why he chose not to follow *Johnson*. His ultimate conclusion, however, was outrageous. Aside from the factual dissimilarities, the Uniform Parentage Act, construed in *Johnson*, was not directly applicable.

Those states in favor of banning surrogacy contracts argue that they exploit and commodify women and are akin to "baby-selling."<sup>67</sup> Arguably, banning surrogacy could actually encourage the type of commodification and baby selling that is sought to be prevented. Banning surrogacy would drive desperate couples underground to seek to obtain a child of their own.<sup>68</sup> Further, willing surrogates, knowing surrogacy is the only way the couple could have a child, would be able to take advantage of these des-

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<sup>67</sup> Hill, *supra* note 46, at 409-10 (stating that the exploitation argument is premised on the idea that women agree to become surrogates because of their social or economic disadvantage, and that these arguments make "frequent allusions to . . . prostitution, and baby-selling"); Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 143 (1986) (arguing that commercialized surrogacy encourages people to think of babies as goods that can be bought and sold); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932 (1987) (stating that the concerns about commodification of women and children stem from "the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Surrogates with 'better' qualities will command higher prices in virtue of those qualities"). O'Brien further argues that "[m]aking this form of trade routine would alter social perceptions of children; babies, like automobiles, stock, and pedigreed dogs, will be viewed quantitatively, as merchandise that can be acquired, at market or discount rates." O'Brien, *supra*, at 144.

The proponents of these arguments, however, do not recognize that some people who become surrogate mothers have a purely altruistic motive. See Radin, *supra*, at 1932-33 (stating that, "there are some situations in which a surrogate can be understood to be proceeding out of love or altruism and not out of economic necessity or desire for monetary gain"). Radin's solution is a compromise between the two factions by proposing that paid surrogacy contracts should be prohibited, but non-paid surrogacy should be permitted. See *id.*; see also Maureen Downey, *A Site for Surrogacy*, ATLANTA JOURNAL AND CONSTITUTION, Jul. 22, 1997, available in 1997 WL 3982632 (quoting a woman who became a surrogate mother because, "[I] have the feeling that [I] easily became pregnant and had [my] bab[y], and [I] want to help someone who hasn't been able to do that").

<sup>68</sup> See OTA REPORT, *supra* note 1, at 280 (acknowledging that when prenatal independent adoptions were declared unenforceable, the practice still continued). The court in *In re Buzzanca* recognized that banning surrogacy would not solve the problem the courts and legislatures face when it stated:

Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.

*In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

perate couples by charging extortionate sums of money as payment for their services.<sup>69</sup> Some states that explicitly ban surrogacy provide that a child born pursuant to such an illegal agreement is automatically the child of the surrogate, and the surrogate must assume all rights and responsibilities for the child.<sup>70</sup> Thus, should a party breach the contract, the surrogate becomes the mother of a child she had no intention of raising, while the intended couple is left without a child. This situation may lead such a couple to enter yet another illegal arrangement to achieve their goal.<sup>71</sup> More disturbingly, the child may be raised by the surrogate mother or couple who may not have wanted the child, and who may then resent having to raise the child. These hostile feelings could be directed at the child in the form of neglect or even physical abuse.<sup>72</sup>

Most states allowing surrogacy do not speak specifically to gestational surrogacy contracts where both anonymous sperm and egg donors are used.<sup>73</sup> Problems then arise in interpreting

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<sup>69</sup> See Richard A. Epstein, *Surrogacy: The Case For Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2319 (1995) (stating that "[n]o one thinks that surrogate arrangements are a first choice. They are a desperate last hope, often for couples who have tried for years to conceive without success. . . ."). Further, if surrogacy contracts were outlawed, the couple's only remaining hope would be to adopt. The difficulties with this option were discussed *supra* note 3.

<sup>70</sup> See, e.g., UTAH CODE ANN. § 76-7-204(3)(a) (Michie 1995).

<sup>71</sup> Another consequence of being unable to have children is strain on the marriage that could lead to divorce. See OTA REPORT, *supra* note 1, at 1 (describing emotional effects of infertility, such as "marital strife" and "family disharmony," which affects both the individual infertile person and the married couple); O'Brien, *supra* note 67, at 129 (stating that "[m]any couples whose parental aspirations have been thwarted by infertility suffer enormous personal anguish and even marital conflict").

<sup>72</sup> See *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55, 69 (Mich. 1976) (Coleman, J., concurring) (stating that "some children are unwanted and cruelly rejected by parents"). Cf. Epstein, *supra* note 69, at 2320 (positing that if surrogacy arrangements were allowed, the risk of child abuse to children might be considerably lower as compared to the risk to children in both stable or broken homes who were naturally conceived). Professor Epstein argues that "[i]t hardly seems likely that a couple that endured so much grief to have its own child would embark on a course of abuse and neglect with a surrogate child." *Id.*

<sup>73</sup> See, e.g., FLA. STAT. ANN. § 742.15(3)(e) (West 1997) (providing that "[a] gestational surrogacy contract must include the following provisions: . . . The gestational surrogate agrees to assume parental rights and responsibilities for the child born to her if it is determined that neither member of the commissioning couple is the genetic parent of the child"); ARK. CODE ANN. § 9-10-201 (Michie 1993) (providing explicitly for surrogacy arrangements performed through artificial insemination by intended father or anonymous donor, but silent regarding gestational surrogacy either through the sperm and egg of the intended parents, or through anonymous

the existing statute: is this type of surrogacy contract prohibited because it was not specifically provided for in the statute, or was the use of anonymous sperm and egg donors not foreseen by the legislature? This lack of specificity leads to the same ambiguities regarding the parties' rights and responsibilities when forming the contract as do those statutes articulating the state's position with respect to banned surrogacy agreements. If parties to the contract are not sure of the state's position should one party attempt to breach, they risk the possibility that, at trial, a court may not enforce that party's expectations.<sup>74</sup> States, either not providing for gestational surrogacy contracts in their existing statutes, or simply not legislating as to this issue whatsoever, are forced to apply case law in determining these issues. California, exercising jurisdiction in *Jaycee*, is one such state without legislation regarding surrogacy agreements.<sup>75</sup>

### B. Case Law

Case law involving surrogacy contracts is relatively new and limited.<sup>76</sup> In determining issues such as custody and parentage of children born as a result of assisted reproductive methods, three principles have been employed: the "best interests of the child" standard, equitable estoppel, and the "intent to procreate" standard. Arguably, it is the intent to procreate standard that should govern surrogacy contracts. This was the standard employed by the appellate court in deciding *Buzzanca*.<sup>77</sup>

The "best interests of the child" standard has commonly been applied in determining custody and adoption proceedings.<sup>78</sup>

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donors).

<sup>74</sup> See *supra* notes 48-50 and accompanying text.

<sup>75</sup> The California courts have requested legislation in the surrogacy area on more than one occasion. The California state assembly attempted to enact legislation but it was vetoed by Governor Pete Wilson. See Peres, *supra* note 14 (quoting Jeffrey Doeringer, attorney for Jaycee Buzzanca).

<sup>76</sup> See *supra* note 7.

<sup>77</sup> See *supra* note 28.

<sup>78</sup> See *Doe v. Doe*, 710 A.2d 1297, 1322-23 (Conn. 1998) (using the best interest of child standard to determine custody dispute over child born through artificial insemination of surrogate with husband's sperm); *In re Baby M.*, 525 A.2d 1128, 1167 (N.J. Super. Ch. Div. 1987), *rev'd on other grounds*, 537 A.2d 1227, 1256 (N.J. 1988) (defining best interests standard and stating that "the only rule of law by which this court may be guided is the application of the doctrine of a child's best interests"); *Burchard v. Garay*, 724 P.2d 486, 488 (Cal. 1986) (stating that California law bases decisions on the best interests of the child when there are competing parental claims to custody); *In re Custody of C.C.R.S., a Child*, 892 P.2d 246, 256 (Colo. 1995)

It is premised on the notion that the child's welfare should be the controlling factor, above all other considerations, in determining custody disputes.<sup>79</sup> Factors considered in deciding the child's best interests include whether the child was wanted, the emotional stability of the people in the home, stability of the family, ability of the parents to respond to the child's physical and emotional needs, and family attitudes towards education.<sup>80</sup> Another important factor considered is the psychological effect on the child of removal from the child's current home.<sup>81</sup> Thus, if the child's best interests call for the child to remain with the person who has physical custody at the time of the proceeding, removal will not be ordered. Conversely, if removal would be better for the child, that becomes the overriding factor.

Equitable estoppel has been applied in the assisted reproduction area when, in the absence of a legal remedy, an equitable remedy is imposed to create a just result.<sup>82</sup> Equitable estoppel has been defined as "[a] remedy available if one party through his course of conduct knowingly misleads or induces another party to believe and act upon his conduct in good faith without knowledge of the facts."<sup>83</sup> The doctrine has been used in divorce and child support cases involving artificial insemination of the

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(asserting that the child's best interest is the guiding principle in determining custody of a child); *Soos v. Superior Court of Maricopa County*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (Gerber, J., concurring) (declaring that "the universal pattern in [Arizona's] domestic relations law [is] to make the determination of the child's custodian an evidentiary matter turning on the child's best interests"); see also DOLGIN, *supra* note 1, at 213-14 (acknowledging that the best interest of the child test "has been institutionalized almost a century for use in the resolution of family law disputes involving children's parentage or custody").

<sup>79</sup> See *Custody of C.C.R.S.*, 892 P.2d at 258-59 (holding that the best interests of the child determined that the child should remain with the psychological parents instead of being returned to the biological parents); *Baby M.*, 525 A.2d at 1167 (quoting *Finlay v. Finlay*, 240 N.Y. 429 (1925)) (stating that the courts "[do] not determine the rights as between parent and child or as between either parent . . . but rather 'interferes for the protection of infants'"). Cf. Hill, *supra* note 46, at 400 (asserting that, "every state has recognized a presumption that it is in the best interests of the child to be placed with its natural parents").

<sup>80</sup> See *Baby M.*, 525 A.2d at 1167-68 (citing Dr. L. Salk, expert witness on issue of best interests of child).

<sup>81</sup> See *Custody of C.C.R.S.*, 892 P.2d at 256-57 (stating that if removal of child from third party's physical custody will cause adverse psychological and emotional effects on the child, the child will remain with the third party) (citing *Reflow v. Reflow*, 545 P.2d 894, 901 (1976)).

<sup>82</sup> See *Levin v. Levin*, 645 N.E.2d 601, 604 (Ind. 1994).

<sup>83</sup> *Levin*, 645 N.E.2d at 604 (citing *Paramo v. Edwards*, 563 N.E.2d 595, 598 (Ind. 1990)).

wife by a third party donor with the husband's consent. Upon divorce, the husband may claim not to owe any child support because a genetic link between himself and the child is absent, thus precluding him from being the legal father.<sup>84</sup> To determine whether the husband should be estopped from denying paternity, the court has looked at the extent of the wife's reliance on her husband's consent in deciding whether to go through with the procedure. If an unconscionable result would be reached if held otherwise, the husband would be estopped from denying legal parentage and would have to support the child.<sup>85</sup> Although the estoppel doctrine has only been applied to artificial insemination cases thus far, the same equitable principles could also apply in the context of gestational surrogacy.

The appellate court in *Buzzanca* recognized that John Buzzanca should be declared Jaycee's legal father under equitable estoppel. Because his consent to the surrogacy arrangement brought about Jaycee's existence, it would be unjust to allow him to disclaim any and all responsibility for her care. If the court extended the underlying principles of the artificial insemination

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<sup>84</sup> See *id.* at 603 (stating that wife bore a child after she was artificially inseminated with sperm not of her husband). The father held the child out as his own for 15 years, but when the couple divorced, he contended that he did not have to pay child support because he was not the child's biological father. The court rejected Levin's claim based on equitable estoppel. See *id.* at 604-05; *In re Marriage of Adams*, 528 N.E.2d 1075, 1089 (Ill. App. Ct. 1988) (Dunn., J., concurring in part and dissenting in part) (stating that in divorce proceeding where child was conceived through artificial insemination of wife, husband may be estopped from denying legal responsibility for the child when he unequivocally consented to the insemination), *rev'd on other grounds*, 551 N.E.2d 635 (Ill. 1990); see also *Gursky v. Gursky*, 242 N.Y.S.2d 406, 412 (Sup. Ct. 1963) (holding that husband who consented to his wife's artificial insemination by the sperm of a third party had legal duty to support the child).

<sup>85</sup> See *Levin*, 645 N.E.2d at 604-05 (stating that husband consented to wife's insemination procedure, induced her to go through with it, held child out as his own for 15 years, and led wife to believe they both would be responsible for the child's support); *Marriage of Adams*, 528 N.E.2d at 1087 (asserting there was no evidence which tended to show that the wife would have nevertheless gone through with the insemination procedure without the consent of her husband). The appellate court ultimately affirmed the trial court's finding of consent by the husband. See *id.*; see also *Gursky*, 242 N.Y.S.2d at 411 (declaring that the purpose of the artificial insemination was to provide a child "for the mutual happiness of the parties"). In *Gursky*, the court also found that there was nothing in the record to indicate that the wife would have gone through with the procedure without her husband's consent. See *id.* at 411-12. In all three of the above-cited cases, the husband was ordered to pay child support. See *Levin* 645 N.E.2d at 605; *Marriage of Adams*, 528 N.E.2d at 1087; *Gursky*, 242 N.Y.S.2d at 412.

statute to gestational surrogacy, then it naturally follows that the concept of equitable estoppel should be applicable as well.<sup>86</sup> The court instead based its decision primarily on *Johnson v. Calvert*<sup>87</sup> and the "intent to procreate" standard.<sup>88</sup> In *Johnson*, the surrogate mother breached the surrogacy contract by refusing to turn the baby over to the Calverts after he had been born.<sup>89</sup> Unlike the *Buzzanca* facts, in *Johnson* the embryo was created by the sperm and egg of the Calverts, and thus both the genetic mother and the gestational mother had a legal claim to the child under California law.<sup>90</sup> Arguably, the "intent to procreate" standard should be applied when a state, like California, has no legislation governing this specific area.

### III. THE "INTENT TO PROCREATE" STANDARD SHOULD GOVERN THESE CASES ABSENT STATE LEGISLATION

The "intent to procreate" standard has been articulated in literary and legal writings about surrogacy,<sup>91</sup> and was used to determine legal parentage in *Johnson v. Calvert*,<sup>92</sup> upon which the

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<sup>86</sup> See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 287 (Ct. App. 1998) (declaring, "[i]t must also be noted that in applying the artificial insemination statute to a case where a party has caused a child to be brought into the world, the statutory policy is really echoing a more fundamental idea . . . [T]hat idea is often summed up in the legal term 'estoppel.'").

<sup>87</sup> 851 P.2d 776 (Cal. 1993).

<sup>88</sup> See *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 288 (stating, "[t]here is no need in the present case to predicate our decision on common law estoppel alone, though the doctrine certainly applies").

<sup>89</sup> See *Johnson*, 851 P.2d at 778. The surrogate mother notified the genetic parents that she would refuse to give up the child unless she received the payments due to her. The couple and the surrogate mother then each sought a declaration from the courts as to who the legal parents were. See *id.*

<sup>90</sup> See *id.* at 778-79. California has adopted the Uniform Parentage Act, which allows maternity to be established by the existence of a genetic link, or from proof that the woman gave birth to the child. See DEERING'S ANN. FAM. CODE §§ 7610 & 7650 (Cal.) (Bancroft Whitney 1996 & 1999 Supp.).

<sup>91</sup> See, e.g., DOLGIN, *supra* note 1; Hill, *supra* note 46, at 357-58 (advocating an "intent to procreate" standard); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990).

<sup>92</sup> 851 P.2d 776 (Cal. 1993). The court stated:

We conclude that although the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.

appellate court in *Buzzanca* relied.<sup>93</sup> The concept of "intent to procreate" is akin to "intent" in a contractual sense. Courts using this test, however, have not decided these disputes using the law of contracts as a guide. Rather, they have attempted to mesh contractual intent basis with traditional methods of family law.<sup>94</sup> They argue that while traditional methods of conception can occur without planning and often without a desire to conceive a child, procreation using assisted reproductive technologies *requires* planning and the desire to have a baby.<sup>95</sup> Thus, there is a manifest intent to create a child.

This intent becomes apparent when one examines the process of creating a child through a surrogacy arrangement.<sup>96</sup> First, the would-be parents must decide they want to have a child. Second, they must determine what method of surrogacy will best suit them. Finally, they must find the appropriate surrogate and then, in the case of gestational surrogacy, they must wait to learn if a child has actually been conceived.<sup>97</sup> Moreover, the sheer expense of these surrogacy arrangements implies that very careful deliberation went into the decision to have a child.<sup>98</sup> A

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*Id.* at 782.

<sup>93</sup> See *Jaycee B. v. Superior Ct.*, 49 Cal. Rptr. 2d 694, 702 (Ct. App. 1996) (citing *Johnson*, 851 P.2d at 776).

<sup>94</sup> See DOLGIN, *supra* note 1, at 182 (asserting that "[i]f the law were clearly to define intent in such cases to reflect principles of contract, the concept would lose its usefulness in mediating conflicting understandings of family"). Opponents of the intent based standard for determining parentage argue that it bases familial relationships solely on contractual arrangements which is contradictory to traditional notions of family values. See *id.* at 213.

<sup>95</sup> See Shultz, *supra* note 91, at 324 (proposing that people using assisted methods of reproduction necessarily plan and deliberate more, in most cases, than couples who use ordinary methods of reproduction). Professor Shultz argues that absent legislation surrounding assisted methods of reproduction, an intent based standard should be used to determine legal parentage. See *id.* at 323.

<sup>96</sup> While the same deliberative process logically applies to any assisted method of reproduction, for purposes of this Comment only references to surrogacy contracts will be made.

<sup>97</sup> Recall that in gestational surrogacy, the embryo is implanted in the surrogate using IVF. See *supra* note 5. In IVF, after the embryo is transferred to the uterine cavity, it must attach in the uterus in order for gestation to begin. There is always the chance that the embryo will not attach and the process must be done again. See also OTA REPORT, *supra* note 1, at 123, 130-31 (discussing in vitro fertilization and some of the risks involved).

<sup>98</sup> See *In re Baby M.*, 525 A.2d 1128, 1143 (N.J. Super. Ct. Ch. Div. 1987) (stating that the surrogate was paid \$10,000 over and above all her necessary medical expenses incurred during her pregnancy), *rev'd*, 537 A.2d 1227 (N.J. 1988); see also OTA REPORT, *supra* note 1, at 275-76 (giving detailed description of necessary ex-

couple without the financial security to both go through with the agreement, and adequately support the child upon birth, would be unlikely to enter into this type of arrangement. Conversely, in an unplanned pregnancy, parents do not have the same opportunity to consider all aspects of having and raising a baby, absent considering abortion or putting the child up for adoption.

The second argument in favor of the intent based standard is that an individual responsible for a child's birth should not be permitted to escape parental obligations. The child would not have been born absent the intended parents' motivation to have a child and their consent to the medical procedure of implantation.<sup>99</sup> Therefore, a parent should not be able to evade their obli-

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penses involved in entering into and performing a surrogacy contract); DOLGIN, *supra* note 1, at 65 (stating that most surrogates in commercial surrogacy arrangements receive anywhere from \$10,000 to \$15,000); Hill, *supra* note 46, at 358-59 (using a hypothetical surrogacy arrangement and stating that the surrogate is to be paid \$10,000).

<sup>99</sup> See Hill, *supra* note 46, at 415 (arguing that the intended parents are "the first cause, or the prime movers, of the procreative relationship" and should therefore be given legal parent status). Professor Hill refers to this as the "But-For Causation Argument" and argues that while any gestational host or gamete provider will suffice to produce a child, only the intended parents "stand[] in the relationship with the child [as] the *but for* cause of the child's existence." *Id.* at 414-15; see also *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (holding that when two women can claim legal parentage to a child born of a gestational surrogacy contract, "she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law"); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (2d Dep't 1994) (following *Johnson v. Calvert* and holding that the gestational mother was the legal mother in a custody dispute over children born through in vitro fertilization of wife with donor's egg and husband's sperm); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) (holding that husband who consented to his wife's insemination with donor sperm could be deemed the child's legal father and become obligated to support the child because he consented to the insemination with the intent that the child be raised as his own); *People v. Sorensen*, 437 P.2d 495, 499-500 (Cal. 1968) (declaring that husband who consents to artificial insemination of his wife with sperm from a third party donor is the child's legal father). The *Sorensen* court appropriately stated, "[o]ne who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible." *Id.* at 499.

The dissenting judge in *Johnson v. Calvert* criticized the majority's reliance on the but-for test in preferring the biological mother over the gestational mother as the legal parent. She argued that but-for causation is a tort principle and should not be applied in the family law setting. See *Johnson*, 851 P.2d at 796 (Kennard, J., dissenting). She also advocated that while the California test for causation is "whether the conduct was a 'substantial factor' in bringing about the event," that test clearly shows that both the gestational mother and the biological mother are equally substantial factors in bringing about the child's birth. She concluded that the majority was "misplaced" in using the intent standard to prefer the biological mother over



gations because the statutes and case law do not yet fully provide for all types of surrogacy arrangements. Similarly, the intent based standard creates predictability and stability for the parties involved, especially for the child.<sup>100</sup> If it is determined at the outset of the agreement that the intended parents will be the child's legal parents, and the surrogate agrees to perform the contract, then she will do so with full knowledge that she will have no parental rights to the child. Additionally, by agreeing to the arrangement, the intended parents will have a full understanding that they will be solely responsible for the child's welfare. Further, should a dispute be subject to a lengthy litigation process, the child will know exactly who his or her parents are, and will never face the possibility of being removed from his or her present home, and having to get to know a "new" mother or father.<sup>101</sup>

Although the *Buzzanca* situation was not at issue before the *Johnson* court, the court recognized the possibility of such a situation. Finding the dicta in *Johnson* determinative, the appellate court reiterated, "a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability."<sup>102</sup> The dissenting justice in *Johnson*, however, advocated the use of a different test—the "best interests of the child" standard. Justice Kennard argued that the child's welfare is of paramount importance, which the best interests standard respects, whereas the intent to procreate standard subordinates the child's interest to those of the underlying con-

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the gestational mother. *Id.* at 795-96. Justice Kennard would have applied the "best interests of the child" standard to determine legal parentage, but did not opine on whether the outcome would have been different. *Id.* at 799.

<sup>100</sup> See Hill, *supra* note 46, at 417 (stating that all the parties to a surrogacy contract are adversely affected when the identity of the parents is not determined at the outset). Professor Hill argues that the gestational host will be less likely to breach the agreement and attempt to keep the child. He asserts that if the surrogate knows at the time of conception she will not have any rights to the child, she will be less likely to develop attachments to the child with the prospect of raising him or her. *See id.* He also claims that the intended parents become better emotionally and financially prepared for the child's birth if they are assured that they cannot lose their child to the surrogate if she attempts to breach the contract. *See id.*

<sup>101</sup> *See id.* at 417 (declaring that when the identity of the parents is unclear and litigation ensues, the child may be uncertain as to who his or her parents are, and may be subjected to shared custody between the surrogate and the intended parents if the judge determines that the surrogate has a parental claim).

<sup>102</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 290 (Ct. App. 1998) (quoting *Johnson*, 851 P.2d at 776).

tractual issues.<sup>103</sup> It is beyond dispute that Jaycee's welfare was the primary concern in deciding the *Buzzanca* case. As the majority stated, however, the intent to procreate standard in surrogacy disputes arguably will almost always coincide with the child's best interests.<sup>104</sup> In this case, by declaring John and Luanne Buzzanca her legal parents, Jaycee was able to maintain and further develop a stable relationship with Luanne, who had provided a home for her since birth. Additionally, she has received support from two parents as opposed to one. These two factors are certainly in Jaycee's best interests, and are also a reflection of John and Luanne's intent at the inception of the surrogacy arrangements.<sup>105</sup> Further, the surrogate's expectations were upheld because she was not burdened with a responsibility she had not contemplated.<sup>106</sup>

Arguably, the intent to procreate standard is more favorable than the best interest standard because, for the latter standard to be applied, the parties must already be in litigation. If parental status is determined at the outset of the contract, the parties will know exactly what their rights and responsibilities are and will enter into the contract with this in mind. Further, the child is less likely to be disrupted when his or her parent-child relationship is decided upon conception, as opposed to the situation here, where the relationship was finally determined three years after her birth.<sup>107</sup>

The available case law on surrogacy appears to have as many variations as do the state legislatures. Until each type of

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<sup>103</sup> See *Johnson*, 851 P.2d at 799 (Kennard, J., dissenting) (declaring that "[t]his 'best interests' standard serves to assure that in the judicial resolution of disputes affecting a child's well-being, protection of the minor child is the foremost consideration"). Justice Kennard also acknowledged that in child welfare issues the courts customarily use the best interests test and argued that "this court should not look to . . . contract law, but to family law, as the governing paradigm and source of a rule of decision." *Id.*

<sup>104</sup> See *id.* at 783. The court stated:

[T]he interests of the children, particularly at the outset of their lives, are "[un]likely to run contrary to those of adults who choose to bring them into being." Thus, "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."

*Id.* (citations omitted).

<sup>105</sup> See *Jaycee B. v. Superior Ct.*, 49 Cal. Rptr. 2d 694, 697 (Ct. App. 1996).

<sup>106</sup> See *id.* at 701.

<sup>107</sup> Jaycee Buzzanca was born on April 26, 1995. See *id.* at 697. It could not be said who her "real parents" were until March 10, 1998.

surrogacy arrangement makes its way through the court system, it is possible for a "parent" to deny his or her obligations and responsibilities through gaps in the existing law. To avoid this problem and the potential damage to the children who become exposed to such litigation, it is imperative that uniform legislation be enacted.<sup>108</sup>

#### IV. PROPOSED LEGISLATION

In 1988, the National Conference of Commissioners on Uniform State Laws approved the Uniform Status of Children of Assisted Conception Act ("the Act").<sup>109</sup> The purpose of the Act was "to provide order and design that would inure to the benefit of those children who have been born as a result of this new modern miracle," focusing on the rights of the children as opposed to their parents.<sup>110</sup> It was specifically "not [meant] to be a regulatory act."<sup>111</sup> The Act provides for two alternatives to assisted conception methods. Alternative B renders all surrogacy contracts void; a child born pursuant to a void contract is the child of the surrogate.<sup>112</sup> Alternative A provides for surrogacy arrangements and requires that the intended couple and the surrogate receive prior court approval to enter into a surrogacy contract.<sup>113</sup> Should parties enter into a surrogacy arrangement that has not received prior court approval, the agreement is void and the surrogate is the legal mother of the resulting child.<sup>114</sup> Once the parties obtain court approval, the intended parents become the legal parents of the child upon birth, and the surrogate waives any parental rights.<sup>115</sup> The requirements that must be

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<sup>108</sup> See *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998) (stating that, "[w]hat is plain, however, is the need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated").

<sup>109</sup> UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 184 (Supp. 1998) [hereinafter "ASSISTED CONCEPTION ACT"].

<sup>110</sup> *Id.* at 185.

<sup>111</sup> *Id.*

<sup>112</sup> See *id.* at 197 (describing surrogate agreements as void).

<sup>113</sup> See *id.* at 190-97. The only state that has substantially adopted this provision is Virginia. See VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1995 & Supp. 1998).

<sup>114</sup> See ASSISTED CONCEPTION ACT, *supra* note 109, at 191 (Section 5(b) provides that "[i]f the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child").

<sup>115</sup> See *id.* § 5(a). Under this alternative, any party to the contract has the right to terminate the contract before the surrogate becomes pregnant so long as they

met by all parties to the contract, in order to receive court approval, are extensive. The Commissioners, however, believed they were necessary in order to ensure the welfare of any child born pursuant to a surrogacy contract.<sup>116</sup> Some of the requirements include: (1) the inability of the intended mother to bear a child; (2) the great risk or injury or death to either the mother or the child during the pregnancy or childbirth; (3) a home study by a child-welfare agency of the intended parents and the surrogate; (4) required fitness standards, like those of potential adoptive parents within a state, which the surrogate and the intended parents must meet; (5) at least one successful prior pregnancy of the surrogate and an assessment that to have another would not pose a risk to either the child or the surrogate; and (6) mandatory counseling for all parties related to the contract.<sup>117</sup> The Act also provides for payment to the surrogate for her services.<sup>118</sup>

Although it would appear that this model legislation would be the solution to the legal deficiency surrounding surrogacy issues, the Act has one major weakness: it does not specifically cover the *Jaycee* situation. Section I of the Act defines intended parents as "a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of *one or both of the intended parents*."<sup>119</sup> The Act does not contemplate that the egg and sperm could be donated by anonymous, non-contracting parties, with the resulting embryo having no genetic relationship to either intended parent. To broaden the Act and to provide fully for all "children who have been born as a result of this new modern

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provide written notice to the court. If the surrogate has also provided the egg, she has the right to terminate the contract without any liability to the intended parents within 180 days after the last insemination. *See id.* § 7 at 194.

<sup>116</sup> *See id.* at 186. The Prefatory Note includes the following statement:

The process may in some instances seem to burden the court, and the intended parents must enter these arrangements fully prepared for certain exigencies and risk, but to assure the desired result there must be some burden, some inconvenience and even some risk when the life and well being of a child is in the balance.

*Id.*

<sup>117</sup> *See id.* § 6(b) at 192 (listing the requirements to approve the surrogacy agreement and declare the intended parents to be the parents of the child).

<sup>118</sup> *See id.* § 9(a) at 196 (stating that a surrogacy agreement under section 6 may provide for the payment of consideration).

<sup>119</sup> *Id.* § 1(3) at 187 (emphasis added).

miracle,"<sup>120</sup> the intended parents must also be the legal parents when both the egg and sperm donors are anonymous.<sup>121</sup>

### CONCLUSION

*In re Marriage of Buzzanca* is the prime example of the inadequacy of the current legal state of surrogacy contracts. Although the people who brought about Jaycee's existence were fully capable of providing for her, and Luanne Buzzanca truly wanted to be Jaycee's mother, Jaycee was a legal orphan until the age of three. The California Supreme Court has declined to hear this case from a subsequent appeal.<sup>122</sup> Although the intermediate court has come up with the best decision under these circumstances, the law unfortunately remains deficient and unsettled. As expressed in the beginning of this paper, the legal fate of children born pursuant to surrogacy arrangements can no longer be avoided. Assisted reproductive methods and surrogacy contracts can enable couples who were at one time destined to remain childless to enrich their lives through the birth of a child. Paradoxically, absent fully encompassing legislation, and with a body of case law that leaves gaps with respect to key issues, the very methods that can create a family can also destroy it.

*Laura A. Brill*

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<sup>120</sup> *Id.* at 185.

<sup>121</sup> See VA. CODE ANN. § 20-156 (Michie 1995 & Supp. 1998) (providing that the intended parents are the legal parents of a child born pursuant to a surrogacy contract regardless of the genetic relationship, or lack thereof, between the intended parents, the child, and the surrogate). This is the definition that should be added to the ULA definition to fully encompass all possible surrogacy arrangements.

<sup>122</sup> See *Buzzanca v. Buzzanca*, 1998 Cal. LEXIS 3830 (June 10, 1998).